

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

~~1975~~
74-2140

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ROBERT BEGINS and PATRICIA BEGINS,
Appellants

v.

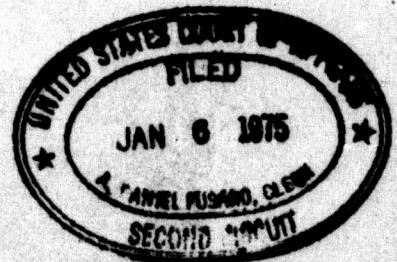
**PAUL PHILBROOK, Commissioner of The
Vermont Department of Social Welfare,**
Appellee

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

Docket No. 74 - 43

BRIEF FOR APPELLEE

DEAN B. PINELES
Assistant Attorney General
Office of Attorney General
Montpelier, Vermont 05602



2

TABLE OF CONTENTS

	Page
Table of Cases	1
Table of Statutes and Other Authorities	111
Statement of the Issue	1
Statement of the Case	1
Argument	3
The District Court Lacks Subject Matter Jurisdiction Since the Case Does Not Present a Cognizable "Controversy"	3
A. Introduction	3
B. The Case is Moot	5
C. The Case is a Request for an Advisory Opinion	8
Conclusion	19
Addendum	20

TABLE OF CASES

	Page
Abbott Laboratories v. Celebreeze 352 F. 2d 286 (3rd Cir. 1965)	14
Abbott Laboratories v. Gardner 387 U.S. 136 (1967)	17, 18
Abele v. Markel, 452 F. 2d 1121 (2d Cir. 1971).....	18, 19
Aetna Life Insurance Co. v. Haworth 300 U.S. 227 (1937)	3, 4, 15
Alabama State Federation of Labor v. McAdory 325 U.S. 450 (1945)	14
American Machine & Metals v. DeBothezat Impeller Co. 166 F. 2d 535 (2d Cir. 1948)	16
Ashwander v. Tennessee Valley Authority 297 U.S. 288 (1936)	3
Brennan v. Rhodes, 423 F. 2d 707 (9th Cir. 1970).....	14
Caldwell v. Craighead, 432 F. 2d 213 (6th Cir. 1970) ...	8
Coffman v. Breeze Corporation, Inc. 323 U.S. 450 (1945).	15
Communist Party v. Subversive Activities Control Board 367 U.S. 1 (1960)	11
Concerned Citizens of Clarksville v. Volpe 445 F. 2d 486 (5th Cir. 1971).....	8
Danville Tobacco Association v. Freeman 351 F. 2d 832 (D.C. Cir. 1965).....	14
Delaney v. Carter Oil Co., 174 F. 2d 314 (10th Cir. 1946).....	17
Dr. Beck and Co. v. General Electric Co. 317 F. 2d 538 (2d Cir. 1963).....	15
Drew Chemical Co. v. Hercules, Inc. 407 F. 2d 360 (2d Cir. 1969).....	15
Electrical Bond Co. v. SEC, 303 U.S. 419 (1938).....	14
Evers v. Dwyer, 358 U.S. 205 (1958).....	19

Golden v. Zwickler, 394 U.S. 103 (1969)	5
Hardware Mutual Casualty Co. v. Schantz 178 F. 2d 779 (5th Cir. 1949)	17
In Re Yao Quinn Lee 480 F. 2d 673 (2d Cir. 1973).....	8
International Longshoremen's Union v. Boyd 347 U.S. 222 (1953).....	11
Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123 (1951).....	4
Keener Oil and Gas Co. v. Consolidated Gas Utility Corp., 190 F. 2d 985 (10th Cir. 1951).....	16
Kerrigan v. Boucher, 450 F. 2d 487 (2d Cir. 1971).....	7
Lebowich v. O'Connor, 309 F. 2d 111 (2d Cir. 1962).....	15
Lecci v. Cahn, 493 F. 2d 826 (2nd Cir. 1974).....	7, 12
Lynch v. Torquato, 343 F. 2d 370 (3rd Cir. 1965).....	14
Maryland Casualty Co. v. Pacific Coal and Oil Co. 312 U.S. 270 (1941).....	4, 5
Maryland Casualty Co. v. Rosen, 445 F. 2d 1012 (2d Cir. 1971).....	15
McCahill v. Borough of Fox Chapel, 438 F. 2d 213 (3rd Cir. 1971).....	14
Merced Rosa v. Herrero, 423 F. 2d 591 (1st Cir. 1970)..	14
Muskrat v. United States, 219 U.S. 345 (1911).....	3
National Student Association v. Hershey, 412 F. 2d 1103 (D.C. Cir. 1969).....	12
North Carolina v. Rice, 404 U.S. 244 (1971).....	6
Poe v. Ullman, 367 U.S. 497 (1961).....	15, 16
Police Department of Chicago v. Mosley 408 U.S. 92 (1971).....	14
Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237 (1952).....	5, 14, 16

Roe v. Wade, 410 U.S. 113 (1973).....	14
Sanders v. Wyman, 464 F. 2d 488 (2d Cir. 1972).....	7
Sellers v. Regents, 432 F. 2d 493 (9th Cir. 1970).....	14
Tucker v. Maher, 497 F. 2d 1309 (2d Cir. 1974).....	8
United Public Workers of America v. Mitchell 330 U.S. 75 (1946).....	9, 10, 12, 14, 16
United States v. Alaska Steamship Co. 253 U.S. 113 (1920).....	5
Watkins v. Chicago Housing Authority 406 F. 2d 1234 (7th Cir. 1969).....	8

TABLE OF STATUTES AND OTHER AUTHORITIES

§2263.4 of the Vermont Welfare Assistance Manual.....	1
28 U.S.C. §2201.....	2,3

I. STATEMENT OF THE ISSUE

Commissioner Philbrook has no objection to the Begins' statement of the issue.

II. STATEMENT OF THE CASE

While the Commissioner has no objection to their statement of the case, certain facts will be repeated here for the purpose of highlighting salient points.

Mr. and Mrs. Begins were granted public assistance benefits under Vermont's Aid to Needy Families with Children Program¹ in January, 1974. At the time, they owned two automobiles. Since, in their case, the ownership of a second car was contrary to the applicable welfare regulation,² the Begins were granted benefits on a 60 day provisional basis with the understanding that one of the cars would be sold within that period of time.

Shortly after assistance was granted, the Begins filed suit in order to challenge this so-called "two car" regulation on statutory, regulatory and constitutional grounds.

¹The program in Vermont is referred to as "Aid to Needy Families with Children" ("ANFC"), rather than "Aid to Families with Dependent Children" ("AFDC") as it is called in the Social Security Act and elsewhere.

²Section 2263.4 of the Welfare Assistance Manual is set out in the Addendum to this brief, *infra* at 20.

Both injunctive and declaratory relief were sought. Before the expiration of the 60 day period, however, they sold their second car on the advice of their caseworker. Thus, since they complied with the regulation, their benefits continued unabated.

After the second car was sold, Commissioner Philbrook moved to dismiss on the grounds that there was no longer a case or controversy since their claim was moot. The District Court's decision to grant the motion is the reason for the present appeal.

Although the Begins have now abandoned their request for injunctive relief, they continue to press their claim for a declaration of their rights under 28 U.S.C. §2201. (Appellants' brief at 7.) The sole basis for this claim, simply stated, is that they "need and want two cars." (Appellants' amended complaint, A-8.) They are reluctant to satisfy this desire, however, because they do not wish to jeopardize their continuing receipt of ANFC benefits.

III. ARGUMENT

THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION SINCE THE CASE DOES NOT PRESENT A COGNIZABLE "CONTROVERSY"

A. Introduction

The appellants are contesting the District Court's decision to dismiss "on the ground that there is no existing

case or controversy since the plaintiffs' claim is moot." While this decision was in direct response to Commissioner Philbrook's Motion to Dismiss for mootness, the appellee is of the view that the case is also deficient on a closely related, alternative ground: it is a request for an advisory opinion. Under either theory, the case fails to present a controversy sufficient for jurisdictional purposes.

Jurisdiction of the federal courts is established under Article III, §2 of the United States Constitution. The grant of judicial power contained therein has long been understood to be limited to situations involving actual "controversies." Muskrat v. United States, 219 U.S. 345, 356 (1911).

The Declaratory Judgment Act of 1934 (28 U.S.C. §2201) expressly incorporates this requirement:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights, and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought ...

That the Act did not increase the jurisdiction of the federal courts was made clear in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936). And as stated in Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) at 239-40:

The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly has regard to the constitutional

provision and is operative only in respect to controversies which are such in the constitutional sense.

What then is meant by a "controversy"? In the Aetna case, which involved a dispute between private litigants, the general parameters were set forth as follows:

A controversy ... must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts ... 300 U.S. at 240-241. (footnotes omitted)

The Supreme Court has also stated that

Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality, to warrant the issuance of a declaratory judgment. Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941) (emphasis added)

In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), a case in which governmental action was challenged, Mr. Justice Frankfurter in a concurring opinion outlined the necessary areas of inquiry in these terms:

(a) Will the action challenged at anytime substantially affect the "legal" interests of any person? (b) Does the action challenged affect the petitioner with sufficient directness? (c) Is the action challenged sufficiently final? Id. at 152. (emphasis added)

Unfortunately, these general guidelines are often difficult to apply.

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Maryland Casualty Co. v. Pacific Coal and Oil Co., supra at 273.

And as stated in Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237 (1952):

In Aetna Life Insurance Co. v. Haworth ... Mr. Chief Justice Hughes used the whole catalogue of familiar phrases to define and delimit the measure of this new remedy. If his metes and bounds are not clearly marked, it is because his available verbal markers are themselves elastic, inconsistent and imprecise. Id. at 242.

It is necessary therefore to compare the facts of the instant case with those of similar cases which deal with mootness and advisory opinions.

B. The Case is Moot

The following cases demonstrate that for purposes of a declaratory judgment the case at hand is moot since "... the existing controversy has come to an end ..." United States v. Alaska Steamship Co., 253 U.S. 113, 116 (1920).

In Golden v. Zwickler, 394 U.S. 103 (1969), cited by the District Court in its Order, the respondent had been prosecuted for violating a state law prohibiting the distribution of anonymous handbills during an election campaign.

His target had been a candidate for Congress in the 1964 election who, at the time of the Court's decision, was a justice on the New York Supreme Court.

Because the handbilling had been directed specifically at that individual, the Court found that the case did not present a live issue. It was stated that "the prospect was neither real nor immediate of a campaign involving the Congressman" and that it was "wholly conjectural" that Zwickler might again be prosecuted. Id. at 109. The Court also stated that, "His assertion in his brief that the former Congressman can be 'a candidate for Congress again' is hardly a substitute for evidence that this is a prospect of 'immediacy and reality.'" Id. The Court then specifically rejected the District Court's conclusion that Zwickler had a "further and far broader right to a general adjudication of unconstitutionality ..." Id.

What the Begins are seeking is nothing more than a general adjudication of their rights with respect to dead facts since they no longer own two cars. It is wholly conjectural that the situation will ever arise again, and therefore is "neither real nor immediate."

In North Carolina v. Rice, 404 U.S. 244 (1971), also cited by the District Court, the respondent had already served the prison sentence he was challenging. Here, the Begins have already rid themselves of their Jeep. In each

case, the facts upon which relief was originally requested ceased to exist.

In Lecci v. Cahn, 493 F. 2d 826 (2d Cir. 1974), the plaintiff sought a declaration that a provision of the New York Election Law was unconstitutional in that it prohibited policemen from engaging in certain politically related activities. This Court determined that the case was moot since, at the time of adjudication in the lower federal court, the named plaintiff had resigned from the police force and was no longer subject to the statute.

In the instant case, the Begins are no longer subject to the "two car" regulation since they have sold their second car. Accordingly, their case is moot.

In Sanders v. Wyman, 464 F. 2d 488 (2d Cir. 1972), certain welfare recipients alleged that their constitutional rights were being invaded by the defendant's release of confidential information. At the time of bringing the action, the plaintiffs were residents of "welfare hotels." On appeal, however, it was disclosed that none of the plaintiffs still lived in the hotels. This Court found that the case was moot; the plaintiffs were no longer in a position to complain of an invasion of their rights.

Similarly, the Begins are no longer in a position to press their claim.

In Kerrigan v. Boucher, 450 F. 2d 487 (2d Cir. 1971), the plaintiff challenged Connecticut's housekeepers' lien

statute. His personal belongings had been seized by the defendant because of a rent arrearage. This Court affirmed the dismissal of the complaint for mootness since the plaintiff had moved from the premises. The decision was premised in part on the fact that it was unlikely that the parties would ever find themselves in a similar relationship. While the parties in the instant case might find themselves in a similar position if the Begins buy another car, it is pure speculation to presume that they will do so.

For additional cases demonstrating that the Begins' claim is moot, see: Tucker v. Maher, 497 F. 2d 1309 (2d Cir. 1974); In Re Yao Quinn Lee, 480 F. 2d 673 (2d Cir. 1973); Concerned Citizens of Clarksville v. Volpe, 445 F. 2d 486 (5th Cir. 1971); Caldwell v. Craighead, 432 F. 2d 213 (6th Cir. 1970); and Watkins v. Chicago Housing Authority, 406 F. 2d 1234 (7th Cir. 1969).

C. The Case Is A Request For An Advisory Opinion

As indicated, the Begins rely totally on the fact that they want and need a second car. They claim that this is sufficient to breathe life into an otherwise dead case. "If plaintiffs accepted the fact that they could not own two cars and no longer wanted a second one, the case clearly would be moot ..." (Appellants' brief at 12)

This desire for a second car, however, does nothing more than provide an additional reason why the case is non-justiciable. Since the actual purchase of such a car is

entirely conjectural, the Begins are requesting an advisory opinion with respect to hypothetical facts.

A leading decision particularly on point is that of United Public Workers of America v. Mitchell, 330 U.S. 75 (1946). In that case, certain federal employees sought, inter alia, a declaration that a provision of the Hatch Act was unconstitutional. The section in question prohibited such employees from taking an active part in political campaigns. The basis of their complaint, which was supported by affidavits, was that they "desired" to engage in political activities prohibited by the Act. Id. at 82, n.1; and at 87, n.18. At the time of initiating the action, however, none had actually violated the Act.

The Court said at 89:

... These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. As these appellants are classified employees, they have a right superior to the generality of citizens ... but the facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy. Appellants want to engage in "political management and political campaigns," to persuade others to follow appellants' political choices. Such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues. It is beyond the competence of the courts to render such a decision. (emphasis added)

The Court continued at 90:

... A hypothetical threat is not enough. We can only speculate as to the kinds of political

activity appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.

And at 91:

No threat of interference by the Commission with rights of the appellants appears beyond that implied by the existence of the law or regulation.

As suggested, the facts in Mitchell are closely analagous to those in the instant case. In the former, the individuals expressed merely a desire to engage in the proscribed activities. Here, the Begins simply "need and want two cars." In the former, there had been no violation of the Hatch Act. Here, there has been no violation of the "two car" regulation. In Mitchell, the claim was considered "hypothetical" because it was impossible for the court to determine what action, if any, the individuals would take. Here, the Court has no way of knowing what, if anything, the Begins would do if the welfare regulation were declared unconstitutional. Would they actually buy another car? Would the vehicle be of a type that does not fall within an exception to the regulation? Would they still be receiving ANFC benefits at the time they bought the car? Would the regulation be applied as they anticipate? Since it is impossible to answer these questions, the Court is being asked to speculate as to what might happen. The Commissioner contends that for this reason the case lacks the necessary "immediacy and reality."

In contrast, it is interesting to note that the Court in Mitchell did find a sufficient controversy with

respect to another federal employee who had actually engaged in the prohibited acts and who had action pending against him. Arguably, the Begins did present a justiciable claim during the 60 day provisional period when they owned two cars.

In International Longshoremen's Union v. Boyd, 347 U.S. 222 (1953), certain alien union members sought to enjoin a District Director of Immigration and Naturalization from applying a section of the Immigration and Nationality Act of 1952 so as to treat the aliens returning from temporary work in Alaska as if they were entering the United States for the first time. Declaratory relief was also sought. The sanctions of the statute, however, had not yet been applied since there had been no occasion for doing so.

The Court said:

... That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. Id. at 224 (emphasis added)

Commissioner Philbrook submits that there is no immediate adverse effect on the Begins. Rather, the opposite is true; their welfare benefits are continuing and there is no threat of discontinuance.

In the case of Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1960), the appellants

challenged the constitutionality of various sections of the Subversive Activities Control Act of 1950, even though only the registration requirement of the Act had been imposed.

The Court said at 71:

Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated.
(emphasis added)

At most, the "two car" regulation presents a potential impairment of the Begins rights.

In Lecci v. Cahn, supra, this Court, relying on Mitchell, held that there was no case or controversy, saying:

Although the plaintiff was a policeman, there is no indication in his complaint that he was proposing to undertake any political activity which might be within the statute.

Here, the Begins have not alleged that they are proposing to violate the welfare regulation. Thus, like the plaintiff in Lecci, they are requesting an advisory opinion.

In National Student Association v. Hershey, 412 F. 2d 1103 (D.C. Cir. 1969), the Court summarized very thoroughly and succinctly the distinction between real and immediate situations on the one hand, and speculative or hypothetical situations on the other.

The Court was faced with the question of whether the mere chilling effect of the so-called "Hershey Directive" on the appellant's First Amendment right was sufficient by itself to make the suit justiciable. In holding that it was, the Court made the following observations:

Two general principles relevant in determining whether a dispute asserted in a declaratory judgment action has "sufficient immediacy and reality" are reasonably clear. The first is that a plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court. The second is that the mere existence of a statute, regulation, or articulated policy is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms. Id. at 1110 (footnotes omitted) (emphasis added)

In discussing the question of potential threats, the Court said:

It is noteworthy that a suit brought before a challenged law has actually been applied to the plaintiff potentially involves two contingencies: whether the plaintiff will in fact act contrary to the apparent command of the law and whether the law will be applied to him if he does. In some cases "general threats" do not confer justiciability because it is not clear that the law's threat actually applies to the plaintiff or his conduct. In others, however, as in Mitchell, supra, the generality of the threat does not significantly detract from its certainty. There, the difficulty must be the possibility that, for all his protestations, the plaintiff may not break the law after all. In the typical case, federal courts ignore statements of intent and wait for the accomplished fact. Id. at 1111. (footnotes omitted) (emphasis added)

Here, even assuming that the challenged regulation would apply, the Court is left with the possibility that the Begins would choose not to violate its terms.

The Court then went on to distinguish the "typical case" from those alleging a First Amendment chill, finding that the latter type "... may be more readily justiciable than

than comparable suits not so affected with a First Amendment interest." Id. at 1113. Appellee Philbrook submits that the instant case is a "typical" one since there are no allegations with respect to First Amendment rights. Therefore, the matter is clearly controlled by Mitchell, supra.

It should be noted here that one of the cases relied upon heavily by the Begins (Police Department of Chicago v. Mosley, 408 U.S. 92 (1971)) involved a First Amendment issue. Although the case was decided on Fourteenth Amendment grounds, the Court found that "... the equal protection claim is closely intertwined with First Amendment interests." Id. at 95. Thus, the case is not apposite for present purposes.

There are many other cases supportive of the appellee's position, all of which involve challenges to governmental action. Among them are the following: Roe v. Wade, 410 U.S. 113 (1973) (with respect to the appellants Doe; see 410 U.S. at 128); Public Service Commission of Utah v. Wycoff, supra; Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945); Electrical Bond Co. v. Securities and Exchange Commission, 303 U.S. 419 (1938); McCahill v. Borough of Fox Chapel, 438 F. 2d 213 (3rd Cir. 1971); Sellers v. Regents of University of California, 432 F. 2d 493 (9th Cir. 1970); Merced Rosa v. Herrero, 423 F. 2d 591 (1st Cir. 1970); Brennan v. Rhodes, 423 F. 2d 707 (9th Cir. 1970); Abbott Laboratories v. Celebreeze, 352 F. 2d 286 (3rd Cir. 1965); Danville Tobacco Association v. Freeman, 351 F. 2d 832 (D.C. Cir. 1965); Lynch v. Torquato

343 F. 2d 370 (3rd Cir. 1965). Cf. Poe v. Ullman, 367 U.S. 497 (1961); Coffman v. Breeze Corporation, Inc., 323 U.S. 450 (1945); Maryland Casualty Co. v. Rosen, 445 F. 2d 1012 (2d Cir. 1971); Drew Chemical Co. v. Hercules, Inc., 407 F. 2d 360 (2d Cir. 1969); Dr. Beck and Co. v. General Electric Co., 317 F. 2d 538 (2d Cir. 1963); Lebowich v. O'Connor, 309 F. 2d 111 (2d Cir. 1962).

At this point it would be useful to compare the cases relied on by the Begins in order to demonstrate further that the issues in their case are not justiciable.

In Aetna Life Ins. Co. v. Haworth, supra, plaintiffs alleged that the defendant (the insured) was not totally and permanently disabled and that his policies had lapsed for non-payment of premiums. The defendant claimed that he was disabled and therefore relieved under the terms of the policies from paying premiums. Thus, a clear factual dispute was presented; certain rights and liabilities existed on the basis of the then present factual circumstances. The case was ripe since neither party had to do anything further to crystalize the dispute.

Such is not true in the case at hand, however. There is no dispute with respect to the facts as they exist at present. There is at most a potential dispute on the basis of facts as they may exist in the indefinite future.

In addition, and more importantly, the Aetna case involved a dispute between private parties, rather than a

dispute over governmental action like the instant case. The appellee submits that this distinction is very significant. In the private area, a resolution of the dispute affects only the competing parties. Not so, however, with respect to public law questions. There, the decree could have ramifications which go far beyond the legal interests of the party seeking relief. As the Supreme Court stated in Mitchell, supra:

It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences on the other. 330 U.S. at 90. (emphasis added)

This distinction was also recognized by the Supreme Court in Public Service Commission of Utah v. Wycoff Co., Inc. supra, wherein it said:

While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. 344 U.S. at 243. (emphasis added)

See also Poe v. Ullman, 367 U.S. 497, 503 (1961).

Despite this crucial distinction between private and public litigation, the Begins appear to support their position with many cases dealing with private controversies. American Machine & Metals v. DeBothezat Impeller Co., 166 F. 2d 535 (2d Cir. 1948); Keener Oil and Gas Co. v. Consolidated

Gas Utility Corp., 190 F. 2d 985 (10th Cir. 1951); Hardware Mutual Casualty Co. v. Schantz, 178 F. 2d 779(5th Cir. 1949); Delaney v. Carter Oil Co., 174 F. 2d 314 (10th Cir. 1946); and all of the cases cited on page 29 of their brief involve disputes of a private nature. The salutary principle of these cases -- that the Declaratory Judgment Act may be invoked to avoid the accrual of damages in private situations -- is simply not applicable here.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which does involve a challenge of governmental action, is also clearly distinguishable. The appellants (various drug companies) were disputing the validity of a regulation implementing a provision of the Food, Drug and Cosmetic Act of 1950, and sought, inter alia, a declaration that the regulation was broader in scope than the statute.

The Court decided that a controversy existed, as well it should have, since the drug companies found themselves in a classic "damned if you do, damned if you don't" situation. As the Court said:

If petitioners wish to comply, they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; they must invest heavily in new printing type and new supplies. The alternative to compliance - continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner - may be even more costly. The course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs. Id. at 152-153.

Thus, the Court stated at 153:

Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of affairs, with serious penalties attached to noncompliance, access to the courts under the ... Declaratory Judgment Act must be permitted ... (emphasis added)

In contrast, the Begins are in no immediate dilemma. No immediate and significant changes are required in their conduct, nor are they now running the risk of any penalties, serious or otherwise, for maintaining their present state of affairs. Abbott Laboratories, therefore, seems well off the mark.

The case of Abele v. Markel, 452 F. 2d 1121 (2d Cir. 1971), is relied on by the Begins by way of contrast. There, this Court, inter alia, denied standing to certain women of child-bearing age who wished to challenge Connecticut's anti-abortion laws. The Court's reasons were as follows:

Although some of them may in the future become pregnant and may in such event desire an abortion in Connecticut, it is also possible that they will not become pregnant or that if they do they will, upon further reflection, decide for other reasons against an abortion. We need not explore the many other conditions that might preclude their gaining any stake or interest, such as change of domicile to another state, infertility, or the like. It is clear that any threat to them is remote and hypothetical. Id. at 1124-25.

The same is true with respect to the Begins. There is just no way to determine what action they would take, if any, were they to receive a favorable judgment. They might well conclude that their welfare benefits were not adequate to support the additional expense of operating another

automobile. Abele, therefore, is supportive of the Commissioner's position.

Finally, in Evers v. Dwyer, 358 U.S. 205 (1958) the Court found a sufficient controversy, but for reasons wholly inapplicable here. That case involved the risk of arrest for violation of a city ordinance; it involved the infringement of fundamental rights; and it involved issues of tremendous social significance. No such claims can be made by the Begins.

IV. CONCLUSION

For the reasons stated in the foregoing Argument, Commissioner Philbrook respectfully requests that the decision of the District Court be affirmed.



DEAN B. PINELES
Attorney for the Appellee
Assistant Attorney General
Office of the Attorney General
Montpelier, Vermont 05602

ADDENDUM

2263.4 Automobiles

An automobile is defined as any passenger car, truck or jeep, registered or unregistered that is in intact condition, stored, or on blocks. An intact vehicle includes all major operating parts, such as engine, transmission, wheels, steering mechanism, etc.

A non-operable automobile minus operating parts is considered junk and thus does not come within the definition of automobile; however, the salvage value of a junked automobile may represent a substantial resource requiring individual evaluation.

One automobile per assistance group, regardless of its value, shall be excluded from consideration within the limitation on combined resources. Ownership of more than one automobile by members of an assistance group shall disqualify the group except as follows:

1. Additional automobile(s) which qualify as "income producing property" shall be considered under the provisions applicable to such property (see Income Producing Property).
2. Additional automobile(s) which would qualify as "income producing property," except that the assistance group member is not presently operating the vehicle because he is incapacitated or disabled, shall be considered under the provisions applicable to such property, provided that:
 - a. The grant of public assistance is based on the incapacity or disability of the assistance group member making use of the vehicle; and
 - b. The vehicle was used to produce income immediately preceding the onset of incapacity or disability; and
 - c. The individual will more probably than not require the vehicle to produce income at the end of the period of incapacity or disability; and
 - d. The duration of incapacity or disability is not expected to exceed one year.

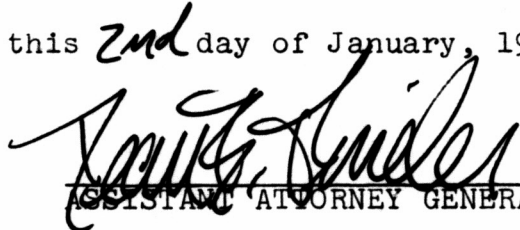
Addendum -- 2

When an applicant indicates willingness to sell additional vehicles which would otherwise disqualify an assistance group, and all other eligibility conditions are met, assistance may be granted provisionally, for a period not to exceed 60 days, pending disposition of such additional automobiles. If sale is not completed within 60 days, assistance shall be terminated. (See also Application Decisions - Money Grant.)

When assistance has been granted under the provisions for considering an additional "income producing" vehicle during incapacity of its operator, actual use to produce income shall be resumed at the end of 12 months. If, at the end of 12 months, it is not possible to use such vehicle(s) to produce income, the vehicle(s) must be sold within 60 days, in order to qualify for continued assistance.

CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of Appellee's brief upon Zander Rubin, Esq., attorney for the Appellant, by posting copies of same in a United States mail receptacle, first class mail, addressed to his last known office address, Vermont Legal Aid, Inc., 56 Railroad Street, St. Johnsbury, Vermont, 05819, on this *2nd* day of January, 1975.



ASSISTANT ATTORNEY GENERAL